

1 ERSKINE & TULLEY
A PROFESSIONAL CORPORATION
2 MICHAEL J. CARROLL (ST. BAR #50246)
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5 Attorneys for Plaintiffs

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7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10

11 BOARD OF TRUSTEES OF THE SHEET)	NO. C 08 0306 BZ
12 METAL WORKERS, et al.,)	
)	
13 Plaintiffs,)	DECLARATION OF ROBIN
)	NIZNIK IN SUPPORT OF
14 vs.)	MOTION FOR DEFAULT
)	<u>JUDGMENT</u>
15 C R SCHELLENGER H V A C INC., etc.,)	
)	
16 Defendant.)	

17
18 I, Robin Niznik, declare:

19 1. I am employed by BENESYS, 2610 Crow Canyon Road, San
20 Ramon, CA 94583, administrators of the SHEET METAL WORKERS HEALTH CARE
21 PLAN OF NORTHERN CALIFORNIA, SHEET METAL WORKERS PENSION TRUST OF
22 NORTHERN CALIFORNIA, SHEET METAL WORKERS LOCAL 104 VACATION, HOLIDAY
23 SAVINGS PLAN. I am the Supervisor of the Contribution Department.
24 In that capacity I am custodian of and am familiar with the books and
25 records of the Trust Funds as they relate to the defendant in this
26 case. If called as witness, I could testify to all of the following
27 facts from my personal knowledge.

28 2. I have been advised that defendant contends in a Notice

1 of Contest that there was "...a complete failure to put defendants on
2 notice regarding the potential exposure to liquidated damages and
3 interest penalties now sought by Plaintiff." (Notice 4:5-7).

4 3. Attached hereto and marked Exhibit 8 is a two page
5 document entitled "Important Reminder, September 2006". It was
6 printed on bright yellow paper and sent that month to every
7 contributing employer, including the defendant in this case. It
8 advises each employer of the 15% interest, the 10% liquidated damages,
9 and, at the top of page 2, that when a matter is referred to counsel,
10 the damages increase to 20%.

11 4. Shortly thereafter defendant failed to pay the
12 contribution due on its accounts for hours worked in October 2006,
13 which were due by November 20, 2006. Defendant paid the contributions
14 on a delinquent basis. They paid 10% liquidated damages of \$811.08
15 on both accounts. Defendant was already on referral to counsel for
16 delinquencies so an additional 10% in damages was due. Defendant was
17 so advised, and paid an additional \$811.08 on March 13, 2007 by
18 mailing it to Erskine & Tulley.

19 5. Again in November 2006 defendant failed to pay its
20 contributions on time. Attached and marked Exhibits 9 and 10 are
21 letters to defendant entitled LIQUIDATED DAMAGES advising "If it
22 becomes necessary to turn this over to the collection counsel your
23 liquidated damages liability may double, but will be limited to 20%
24 of the fringe benefit total.

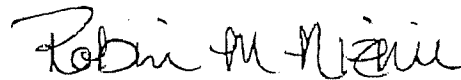
25 6. I have been advised that defendant contends that
26 "...Plaintiffs have failed to acknowledge several payments". I have
27 reviewed the detail sheet provided to the Court as Exhibit 3. It is
28 not up to date. Defendant has made some payments.

1 7. Defendant has two accounts with us. Account 326720 is
2 for the union members who worked there. Account 318225 is for the
3 Owner/Member account for Mr. Schellenger. Defendant has sent in
4 payments for the Owner/Member account, but the trust fund rules
5 require me to reallocate those payments to the Union workers' account,
6 because the workers' benefits must be credited before the owners.

7 8. Attached and marked Exhibit 11 is a revised and updated
8 version of Exhibit 3. It includes all payments made by the defendant.
9 Note that the \$2,800.00 paid June 5, 2008, which shows on Exhibit 3,
10 was allocated on June 21, 2008 partly to the Member Account for
11 10/2007 (\$1,032.09) and partly to 11/2007 (\$1,767.91). The
12 computations of liquidated damages and interest have also been brought
13 up to date.

14 I declare under penalty of perjury that the foregoing is
15 true and correct.

16 Executed on August 7, 2008 at San Ramon, California.

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19 ROBIN NIZNIK
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IMPORTANT REMINDER

September 2006

To: All Contributing Employers
Sheet Metal Workers of Northern California Pension Trust Fund

Re: Procedures for Fringe Benefits Contributions Reporting

This is a summary of procedures for all fringe benefits reporting under the Sheet Metal Workers of Northern California Pension Trust Fund.

Please review the following summary of procedures and feel free to call the Trust Fund Office at (925) 208-9999 if you have any questions.

<i>Due Date for Contributions</i>	Contributions are due on the 10 th of the month and are delinquent if postmarked later than the 20 th of the month following the work month (i.e. contributions for hours worked in April are due May 10 th and delinquent if postmarked after May 20 th .) In order to determine when contributions were mailed, the Trust Fund Office must rely on postage cancellation stamps and not postage meter charges. Failure to remit contributions by the due date (10th) may result in delays for transferring contributions to various fringes (i.e. vacation account transfers, supplemental pension contributions, etc.).
<i>Vacation Contributions</i>	For employers who are signatory to a Collective Bargaining Agreement requiring Vacation Contributions to be remitted to the Trust Fund Office, Participants have been advised by certain credit unions that vacation contributions are available on the 5 th working day of the month. In order for such contributions to be available on the 5 th working day of the month, the Trust Fund Office will process contributions that are <u>deposited</u> on or before the 20 th of the month. The Trust Fund office cannot guarantee that contributions deposited after the 20 th of the month will be available by the 5 th working day of the following month.
<i>Account considered Delinquent;</i> <i>Liquidated Damages Assessed</i>	Employer contribution reports bearing postage cancellation stamps on or after the 21 st of the month are considered delinquent resulting in the assessment of Liquidated Damages of 10% or \$20 per fringe benefit, whichever is greater, for <u>Health Care</u> and <u>Pension</u> (for other benefits, 10% or \$25 per benefit, whichever is greater, but not to exceed an aggregate of 10% or \$100.00, whichever is greater).
<i>Interest Charged</i>	Interest on late contributions of fifteen (15%) percent is charged.
<i>Delinquency notice To Employers</i>	Employers are usually notified twice before they are referred to Collection Counsel initially and again by the 10 th of the month following the month in which contributions were due). This is done to enable the employer to become current and thereby avoid the increased charges. The Board of Trustees has the discretion, however, to refer any delinquency matter to Collection Counsel immediately.

<i>Liquidated damages Increase</i>	Once a matter is referred to Collection Counsel, liquidated damages increase as of the date of referral to 20% of the total amount of any billing still due and owing as of that date.
<i>Local Union is Notified...</i>	On the 15 th of the month following the month in which contributions are due, but unpaid, the Union will be notified and may, in turn, notify the Employer that bargaining unit employees will be withdrawn in forty-eight hours from the date specified in the notice, unless payment is made.
<i>Union Employees Withdraw (48 hours)</i>	The Union may also withdraw the employees: 1) when an Employer signed to a payment plan is thirty (30) days late, or 2) When an Employer fails, within fourteen (14) days, to respond to an audit letter notifying the Employer of payment discrepancies found in the course of an audit or 3) As permitted by the Collective Bargaining Agreement
<i>Account referred to Collection Counsel</i>	Employers who have not reported by the 20 th of the month following the month in which contributions are due, and/or who submit reports without money, and/or who submit reports received with a returned check are referred to Collection Counsel. At that time, Liquidated Damages are doubled. Interest of 15% is also charged. The employer is responsible for any court costs and attorneys' fees.
<i>Waiver Requests</i>	Waiver Requests for Liquidated Damages will be granted to an employer for one month, only once in any 12-month period, and then only upon written appeal to the Board of Trustees.
<i>No Credit Adjustments</i>	Any requests for adjustments or credits must be submitted in writing to the Board of Trustees. No automatic adjustments may be taken on the contribution report unless authorized in writing by the Board of Trustees.
<i>Employer Reporting Forms</i>	The Collective Bargaining Agreement provides that payments to the Trust Fund Office shall be made on such a report form as designated by the parties signatory to the agreement and acceptable by the Trustees. Use of forms other than those provided by the Trust Fund requires approval from the Trust Fund Office. Use of non-approved forms may cause delays in processing and could result in assessment of liquidated damages.

Again, if you have any questions regarding the procedures for correctly submitting contributions for fringe benefits, billing and reporting cycles, deadlines, or other operations administered by the Trust Fund Office, please call the Trust Fund Office at (925) 208-9999.

Sincerely,

**Board of Trustees,
Sheet Metal Workers of Northern California Pension Plan**

SHEET METAL WORKERS LOCAL 104 FRINGE BENEFIT FUNDS

P.O. Box 1917
San Ramon, California 94583
(925) 208-9994 (800) 548-1771

COPY

LIQUIDATED DAMAGES

C R SCHELLENGER HVAC
11 TERRACE DRIVE
CALISTOGA CA 94515

Run Date : 01/11/07
Employer #: 326720
Area: 0666

Dear Employer:

We received your report and contributions on JANUARY 8, 2007 for the work month of NOVEMBER 2006 with a total due of \$3,891.62. Employer contribution reports bearing postage cancellation stamps on or after the 21st of the month are considered delinquent and assessed Liquidated Damages of 10% or \$20 per fringe benefit whichever is greater, for Health Care and Pension (for other benefits, 10% or \$25 per benefit, whichever is greater). If it becomes necessary to turn this over to the collection counsel, your LD LIABILITY MAY DOUBLE but will be limited to 20% of the fringe benefits total.

Liquidated damages in the amount of \$389.16 are now due and payable.

Mail a copy of this notice along with your check to the above address within 30 days. Please make your check payable to:
Sheet Metal Workers Of Northern California Pension Trust Fund.

If you should have any questions, please do not hesitate to contact our office.

Respectfully submitted,

Fund Office, Contribution Department

CC: Collection Counsel

SHEET METAL WORKERS LOCAL 104 FRINGE BENEFIT FUNDS

P.O. Box 1917
San Ramon, California 94583
(925) 208-9994 (800) 548-1771

COPY

LIQUIDATED DAMAGES

C R SCHELLENGER HVAC
-OWNER/MEMBER
11 TERRACE DRIVE
CALISTOGA CA 94515

Run Date : 01/11/07
Employer #: 318225
Area: 0666

Dear Employer:

We received your report and contributions on JANUARY 8, 2007 for the work month of NOVEMBER 2006 with a total due of \$4,037.04. Employer contribution reports bearing postage cancellation stamps on or after the 21st of the month are considered delinquent and assessed Liquidated Damages of 10% or \$20 per fringe benefit whichever is greater, for Health Care and Pension (for other benefits, 10% or \$25 per benefit, whichever is greater). If it becomes necessary to turn this over to the collection counsel, your LD LIABILITY MAY DOUBLE but will be limited to 20% of the fringe benefits total.

Liquidated damages in the amount of \$403.71 are now due and payable.

Mail a copy of this notice along with your check to the above address within 30 days. Please make your check payable to:
Sheet Metal Workers Of Northern California Pension Trust Fund.

If you should have any questions, please do not hesitate to contact our office.

Respectfully submitted,

Fund Office, Contribution Department

CC: Collection Counsel

O/M Acct Er#318225

Work Month	Total Reported	Due Date	Payment	Deposit Date	Balance Due	LD's Due	15% Interest
10/2007	\$3,822.64	11/20/2007			\$3,822.64	\$764.53	\$382.24
11/2007	\$3,822.64	12/20/2007			\$3,822.64	\$764.53	\$334.46
12/2007	\$2,691.76	1/20/2008			\$2,691.76	\$538.36	\$201.90
01/2008	\$2,691.76	2/20/2008			\$2,691.76	\$538.36	\$168.25
02/2008	\$2,691.76	3/20/2008			\$2,691.76	\$538.36	\$134.60
03/2008	\$2,691.76	4/20/2008			\$2,691.76	\$538.36	\$100.95
04/2008	\$3,421.26	5/20/2008			\$3,421.26	\$684.25	\$85.54
05/2008	\$2,691.76	6/20/2008			\$2,691.76	\$538.36	\$33.65
06/2008	\$2,691.76	7/20/2008			\$2,691.76	\$538.36	\$0.00

Member Acct Er#326720

10/2007	\$7,145.11	11/20/2008	\$2,691.76	6/3/2008	\$0.00	\$1,429.02	\$535.86
			\$3,421.26	6/3/2008			
			\$1,032.09	6/21/2008			
11/2007	\$5,683.55	12/20/2008	\$1,767.91	6/21/2008	\$0.00	\$1,136.71	\$355.20
			\$2,691.76	6/23/2008			
			\$616.36	6/26/2008			
			\$607.52	7/29/2008			
12/2007	\$3,143.96	1/20/2008	\$2,084.24	7/29/2008	\$1,059.72	\$628.79	\$196.50
					\$28,276.82	\$8,637.99	\$2,529.15